Report on How Feedback was Addressed

in the *Government of Saskatchewan*

First Nations and Métis Consultation Policy Framework

June 2010

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Introduction

During the past two years the Government of Saskatchewan has been engaged in a process to revisit the guidelines on First Nation and Métis consultation. The participation of First Nations and Métis leadership, industry representatives, the municipal sector and other interested groups has been vitally important to this process. Government has listened to your comments and concerns through this process and, where possible, included them in the new *First Nations and Métis Consultation Policy Framework* (*CPF*).

The purpose of this document is to provide a summary of the feedback received by the Government on the December 2008 *Draft First Nation and Métis Consultation Policy Framework*, and show how it was used in drafting the final policy.

Background

Prior to the November 2007 Provincial election, Premier Brad Wall, then Leader of the Opposition, committed to a review of the Government's approach to consultation with First Nations and Métis. The Ministry of First Nations and Métis Relations (FNMR) led the review process on behalf of Government. The May 2008 Roundtable Conference on First Nations and Métis Consultation and Accommodation was held to receive input from First Nations, Métis, industry, municipal sector and others. More than 400 representatives of these groups attended the conference. Further information was received at subsequent summits and meetings with tribal councils, Treaty organizations, the Métis - Nation Saskatchewan (MNS), industry and municipal associations.

Government then released its *Draft First Nation and Métis Consultation Policy Framework* on December 22, 2008 (December 2008 draft policy) for further feedback. The draft took into consideration input received at the Roundtable, as well as papers provided by First Nations, Métis and industry representative groups. It was mailed to approximately 250 individuals including the Chiefs of all First Nations, tribal councils and the Federation of Saskatchewan Indian Nations (FSIN); Métis Local Presidents, Métis Regional Directors and the Executive of the MNS; chief executive officers of companies and industry associations impacted by consultation, in particular mining, oil and gas and forestry; and municipal sector representatives. The document was also placed on FNMR's website allowing comment from other interested parties.

In response to requests from some respondents for more time to effectively review the draft policy, the two-month review period was extended to a five-month period, ending June 1, 2009. Information received from the FSIN and MNS after that date was also taken into consideration. In December 2009, the Government indicated that it would defer releasing the policy until after March 31, 2010 in order to receive consultation policies it understood were to be forthcoming from the FSIN and MNS and to have the opportunity for discussion with the organizations on their respective policies.

Who Responded to the December 2008 Draft Policy?

In developing the new policy, FNMR considered responses from several interested groups. They were:

- Seven Saskatchewan First Nations: English River First Nation, Big Island Lake Cree Nation, Beardy's and Okemasis First Nation, Birch Narrows Dene Nation, Gordon First Nation, Sweetgrass First Nation, Moosomin First Nation;
- Cold Lake First Nations, Alberta;
- Two Treaty Groups: Participating Treaty 6 First Nations and Treaty 4 First Nations in Saskatchewan and Manitoba, together representing approximately 50 First Nations;
- Federation of Saskatchewan Indian Nations;
- Métis Nation – Saskatchewan;
- Two municipal organizations: Saskatchewan Urban Municipalities Association and Saskatchewan Rural Municipalities Association;
- Seven companies and industry associations: Saskatchewan Mining Association, Canadian Association of Petroleum Producers, Enbridge Inc., Husky Energy, Weyerhaeuser, Small Explorers and Producers of Canada, and Saskatchewan Chamber of Commerce; and
- One individual: PhD Candidate, University of Manitoba.

What We Heard

The feedback and recommendations provided by respondents on the December 2008 draft policy submitted to FNMR were carefully reviewed and categorized into broad thematic groups as part of the analysis of the overall content. While a summary of the feedback can be found in Table 1, the main thematic groups are:

- Greater clarity in relation to how the Government intends on assessing when the duty to consult is triggered and, if so, what level of consultation is required for the purposes of fulfilling that duty.
- More detailed information and clarity respecting the types of decisions subject to the consultation policy and the rights that may be affected by these decisions.
- A greater level of attention to important policy implementation mechanisms such as consultation participation funding, traditional territory mapping and consultation protocols, which may improve efficiency.
- The provision of clearer definition of accommodation, including accommodation options available to decision-makers and the parties responsible for providing accommodation, including financial compensation.
- A clearer definition of the roles and responsibilities of the parties involved in consultation processes, including those of First Nations, Métis, industry and municipalities.
- Greater clarity around timeframes and timelines associated with the consultation process, including information on how the Government intends on enforcing timelines.
- The need for consultation to be directly linked to constitutional rights, resource revenue-sharing, consent on decisions, inclusion of mineral dispositions, past decisions and requirement for economic accommodation and compensation.

Both the FSIN and MNS formally rejected the December 2008 draft, the FSIN by resolution at its Legislative Assembly on February 18, 2009 and the MNS at a meeting of the Provincial Métis Council, February 22 - 23, 2009. However, FNMR received a document from the FSIN dated August 27, 2009 entitled "The Duty to Consult First Nations," which includes 10 Treaty Implementation Principles and 16 legal principles established by the courts on the duty to consult. As well, in August 2009, MNS provided FNMR with a draft document entitled "Métis Nation – Saskatchewan: Duty to Consult and Accommodate Policy and Principles" which was approved by the Provincial Métis Council, but not the Métis Nation Legislative Assembly held in November 2009. Both these documents were considered in the policy development process.

How Input was Addressed in the *Government of Saskatchewan First Nations and Métis Consultation Policy Framework*

Table 1 provides a more detailed breakdown of the main issues and concerns raised by respondents during the review period and how they were addressed in the final CPF. A summary of how the CPF compares with the key principles in the FSIN and MNS documents appears in Table 2.

Table 1: Summary of Feedback and How It Was Addressed

Feedback Common Among Respondents	How Addressed in the CPF
1. Most respondents wanted greater clarity on how Government assesses when the duty is triggered, the criteria for project size and type, and what level of consultation is required.	1. The CPF includes a list of decisions subject to an assessment for consultation obligations as well as matters not subject to the policy. Further detail on this assessment is provided in the Consultation Matrix. These concerns will also be addressed in greater detail in the ministries' operational procedures when they are developed or updated.
2. First Nations, industry and municipalities wanted the policy to address private lands and leased agricultural Crown lands. This is important to industry when developments cross these lands.	2. The CPF includes a section explaining how the policy to consult applies or does not apply to private lands and leased agricultural Crown lands.
3. First Nations, Métis, industry, municipalities and Crown corporations wanted the policy to address sacred sites and/or traditional uses.	3. Potential adverse impacts on "traditional uses of lands and resources" is included in the policy application. Traditional uses includes gathering plants for food and medicinal purposes and carrying out ceremonial and spiritual observances and practices on unoccupied Crown lands and other lands to which First Nations and Métis have a right of access for these purposes.
4. First Nations and industry stated that clarification is required regarding the link between the duty to consult and regulatory processes such as environmental assessment and land use planning.	4. The CPF includes a statement that the consultations undertaken to satisfy regulatory processes, such as environmental assessment and land use planning, may also satisfy, in whole or in part, the duty to consult.

5. Industry felt the time periods for notification and consultations were too long, First Nations believed them to be too short.	5. Timelines were adjusted to reflect the level of consultation required and a compromise between industry and First Nation interests. Parties are required to use best efforts to adhere to them. Proponents are encouraged to begin early in the pre-planning and planning stages with information sharing and relationship-building.
6. First Nations and industry felt that economic benefit sharing, environmental stewardship, traditional territory mapping and traditional use studies, appropriate capacity and dispute resolution were important factors for successful consultation.	6. These matters will be addressed in the Exploratory Phase.
7. First Nations and industry wanted more examples, options and/or mechanisms for accommodation.	7. The CPF provides the various forms of accommodation that could be considered.
First Nations and Métis Feedback	**How Addressed in the CPF**
1. First Nations wanted to see reference to sacred sites and use of traditional knowledge in consultation.	1. These are now recognized in the CPF as noted in #3 above.
2. Most First Nations stated that the CPF needs to include consultation on mineral disposition, and a requirement for economic accommodation.	2. The CPF confirms that Government's issuance of mineral dispositions under *The Crown Minerals Act* will not trigger the policy. Matters related to "economic accommodation" are not addressed in the policy. Sharing in the Province's economic growth will be discussed as part of the Exploratory Phase
3. Consultation needs to include compensation for past infringements and First Nation consent to developments.	3. The CPF generally does not apply to decisions and actions that have occurred in the past and specifically provides that compensation will not be provided for past actions. The policy states that in instances where a Government decision or action results in a significant, unavoidable infringement on Treaty and Aboriginal rights, financial compensation may be required for loss of use or access to exercise the right. Government will determine compensation on a case-by-case basis and will not address past actions. The CPF specifically provides that Government retains final decision-making authority and that First Nations and Métis do not have a veto.

4. The concept of a consultation assessment matrix aligning intensity of consultation with intensity of impact was generally endorsed. However, there was an issue with Government undertaking the initial assessment unilaterally and with the draft matrix focusing on scope of Government activity rather than impact on rights.	4. The Consultation Matrix focuses on the impact on the exercise of rights and traditional uses as opposed to the scope of the activity. The CPF still provides for Government to initially make an assessment about the level of consultation required in a particular case but specifically acknowledges that any new information received from First Nations and Métis will be used to reassess the impact and may elevate the level of consultation required.
5. First Nations and Métis said that industry should be required to enter into agreements with them to derive benefits from activity in their traditional territory, including training, employment, contracts, equity participation and profit-sharing.	5. The CPF does not require industry to enter into these sorts of agreements with First Nations and Métis. Industry engagement with First Nations and Métis will be further examined in the Exploratory Phase.
6. First Nations want "free, prior and informed consent."	6. The CPF does not provide for consent and states that First Nations and Métis do not have a veto over Government decisions.
7. First Nations and Métis are concerned about the cumulative environmental impacts of development on the environment and erosion of the ability to exercise their rights.	7. Cumulative environmental impacts are not specifically addressed in the CPF; however, they may be considered in the Pre-Consultation Assessment to assist in determining the level of consultation required and may also be raised by First Nations and Métis as part of their responses during consultation processes, at which time they will be seriously considered.
Municipality Sector Feedback	**How Addressed in the CPF**
1. Municipal sector representatives had the view that, if municipalities have a duty to consult, it is delegated by the Province who must provide funds to them to undertake consultation.	1. The CPF states that municipalities may have a duty to consult whenever they independently exercise their legal authority in a way that might adversely impact the exercise of Treaty and Aboriginal rights and/or traditional uses on unoccupied Crown land. Municipalities may also be proponents and would have responsibilities as outlined in the CPF.
Industry and Crown Corporation Feedback	**How Addressed in the CPF**
1. Some industry sectors supported delegation of procedural aspects to proponents while others did not support delegation.	1. The CPF states that Government will not delegate its responsibility for consultation; however the CPF provides that Government may assign to proponents procedural aspects of consultations, such as information-sharing. Any related costs would be the proponent's responsibility.
2. Industry wanted more information on what triggers consultation.	2. A list of the types of decisions that may trigger and that don't trigger consultation is provided in the CPF.

3. Industry raised concerns about the need for clarity around who pays for compensation and accommodation, where it is determined that rights are impacted.	3. The CPF states that proponents will pay the costs of their engagement in consultation processes and procedures that may be assigned to them, as well as costs of adjustments to projects to avoid or lessen impacts on rights. In instances where a Government decision or action results in a significant, unavoidable infringement on Treaty and Aboriginal rights, financial compensation may be required for loss of use or access to exercise the right. Government will determine compensation on a case-by-case basis and will not address past actions.
4. Industry endorsed the consultation matrix concept but wanted more definition and clarity in it to enable them to determine what kind of consultation and timelines to expect.	4. The Consultation Matrix was reconfigured for additional clarity, however, it could not address the many kinds of specific exploration and development projects possible on the land. When finalized, ministries' operational procedures should provide another level of detail.
5. Industry wanted to know how the policy would apply to past decisions and actions, and permit renewals, extensions or transfers.	5. The CPF is not retroactive and does not address past decisions or actions. The renewal, extension or transfer of an existing disposition does not automatically trigger the duty. Only new potential adverse impacts on rights and traditional uses will be considered when determining if consultation is required and at what level.

Table 2: Comparison of Key Points in FSIN and MNS Documents with the *Government of Saskatchewan First Nations and Métis Consultation Policy Framework*

Federation of Saskatchewan Indian Nations: *The Duty to Consult First Nations*, August 27, 2009 document, Legal Principles Section	**How Addressed in the CPF**
1. Consultation is an ongoing process and is always required. (*Haida*)	1. Consultation is not always required for every Government decision; however, the policy will be triggered by Government decisions and actions that have the potential to adversely impact the exercise of Treaty and Aboriginal rights and traditional uses.
2. Consultation is a "two-way" street with obligations on each side. (*Ryan, Halfway River*)	2. The CPF deals with the obligations of Government to consult and recognizes under the Guiding Principles that First Nations and Métis have a reciprocal responsibility to participate in good faith and make their concerns known to Government.

3. Consultation and accommodation are constitutional obligations. (*Kapp*)	3. The CPF is premised on the understanding that the duty to consult is a constitutional obligation. The CPF sets out the policy Government will follow in order to meet its obligations. The CPF goes beyond Government's strict legal obligations with respect to certain matters, such as inclusion of traditional uses.
4. First Nations' input must be seriously considered, substantially addressed and, as the context requires, may require accommodation. (*Mikisew, Halfway River*)	4. The CPF generally affirms that First Nations and Métis input must be taken seriously and that specific steps should be taken to avoid, minimize or mitigate the impact of decisions on Aboriginal and Treaty rights including, in some instances, accommodation.
5. Stakeholder processes will not be sufficient to discharge the Crown's duty to consult (*Mikisew*) nor will public processes open to First Nations, such as participation in public hearings, be sufficient to discharge the Crown's duty to consult. (*Dene Tha'*)	5. Where there might be an adverse impact on Aboriginal or Treaty rights or traditional uses, the CPF does not consider First Nations and/or Métis to be mere stakeholders. The CPF does provide that Government may consider opportunities for First Nation and Métis consultation that are available within the existing regulatory processes, such as environmental assessment or land use planning, to satisfy in whole, or in part, the duty to consult.
6. The Crown has a positive obligation to provide full information on an ongoing basis, so that First Nations can understand potential impacts of decisions on their rights (*Jack, Sampson, Halfway*) and such information must be responsive to what the Crown understands to be the concerns of the First Nations (*Mikisew*).	6. The Guiding Principles and the Consultation Process outlined in the CPF are built on openness, integrity and good faith. The CPF requires that the notification provided to First Nations and Métis be "Clear, complete and understandable" and that it provides information on the extent and likely duration on any impacts on rights and traditional uses. As well, the project proponent may be asked to provide specific information on the project and its scope.
7. The Crown must properly discharge both its procedural and substantive duties in any consultation process (*Mikisew*) and a failure to properly satisfy process-related concerns of First Nations, irrespective of the ultimate impact on substantive rights, may be a basis upon which a decision can be struck down (*Mikisew*).	7. The CPF sets out how the Government will fulfill both its procedural and substantive obligations with respect to the duty to consult. The CPF does not address the consequences of any failure to follow the process that it sets out as this is a legal issue that would have to be addressed by the courts.
8. The Crown must have sufficient, credible information in decision-making and must take into account the long term sustainability of s. 35 rights (*Roger William*).	8. The CPF provides that Government must notify First Nations and Métis about pending decisions that could adversely affect Aboriginal and Treaty rights and traditional uses in order to obtain the necessary information to make well informed decisions and requires Government to seriously consider the information received from First Nations and Métis. Government decisions must take into account various interests, including Treaty rights.

9. The purpose of consultation is reconciliation and not simply the minimization of adverse impacts (*Dene Tha*).	9. One of the objectives of the CPF is to advance the process of reconciliation between Aboriginal and non-Aboriginal peoples and their respective claims, interests and ambitions.
10. Consultation must take place early, before important decisions are made – at the 'strategic planning' stage (*Haida, Dene Tha, Squamish Nation*).	10. The CPF states, "Notification must be as early as possible and in advance of the decision to be made."
11. Consultation cannot be postponed to the last and final point of a series of decisions (*Squamish Nation*).	11. The CPF provides that Government must initiate consultation as early as possible and in advance of the decision to be made and emphasizes that the proponents should engage First Nations and Métis early and prior to pursuing specific projects.
12. Consultation is required in respect of the design of the consultation process itself (*Huu-ay-aht*).	12. In cases where there will be "permanent uptake or alteration of land and/or permanent change in resource availability with a potentially significant impact," a Level 5 Consultation is required. The CPF instructs that "written notice is provided with offer to meet with the community to discuss project, develop a consultation plan and determine capacity needs."
13. First Nations must be consulted about the design of environmental and regulatory review processes (*Dene Tha'*).	13. Where Level 5 consultations are required and the Government intends to rely upon existing regulatory processes such as environmental assessment and land use planning to fulfill the policy, in whole or in part, First Nations and Métis will be consulted about the design of the process and the role they will have.
14. Consultation cannot just be in respect of "site specific impacts" of development but must also focus on the cumulative impacts, derivative impacts, and possible injurious affection resulting from development (*Dene Tha', Taku River, Mikisew, Roger William*).	14. The CPF does not specifically address cumulative impacts, but this is a factor that may be taken into account in determining the level of consultation required with respect to any specific decision. First Nations and Métis can also raise concerns about cumulative impacts during consultations and the CPF commits the Government to seriously consider those concerns.
15. The Crown must approach consultation with an open mind and must be prepared to alter decisions depending on the input received (*Haida*).	15. The CPF's Guiding Principles say the Government will approach consultations with an open mind, conduct itself with integrity during consultation processes and deal in good faith with First Nations and Métis. The Government will listen to and consider seriously First Nations and Métis concerns respecting potential impacts on Treaty or Aboriginal rights and traditional uses when making decisions.

16. Consultation cannot be determined simply by whether or not a particular process was followed, but on whether the results are 'reasonable' in light of the information presented, degree of impacts, and related matters *(Wil'itsxw)*.	16. An objective of the CPF is to respect and protect Treaty and Aboriginal rights by ensuring, through the consultation process and subsequent decisions, that negative impacts on these rights and uses are avoided, minimized or mitigated and rights and traditional uses are accommodated, as appropriate. The CPF is not simply about process but rather is intended to ensure that Government receives the information that it needs about the potential impact of pending decisions on Treaty and Aboriginal rights and traditional uses in order to make fully informed and reasonable decisions, with the recognition that Government decisions must take into account and balance a number of competing interests in addition to the impacts on rights and traditional uses.
Métis Nation – Saskatchewan: *Duty to Consult and Accommodate Policy and Principles*. Section 1.2 Consultation and Accommodation Principles	**How Addressed in the CPF**
1. The fulfillment of the duty requires good faith on the part of all parties and consultations must be conducted in an equitable, transparent and respectful manner.	1. The Guiding Principles in the CPF set out that the Government will approach consultations with an open mind, conduct itself with integrity during consultation processes and deal in good faith with First Nations and Métis people and that consultations will be undertaken in a spirit of mutual respect and trust and be transparent.
2. Timelines must be reasonable and provide sufficient opportunity for the parties to exchange, review and assess information developed through a duty to consult activity.	2. The CPF provides that adequate timelines should be allowed for First Nations and Métis to receive, consider and respond to notifications. The timelines, as outlined in the Consultation Matrix, should be sufficient to review materials, assess the information and respond with concerns. Timelines are also flexible depending upon information received and capacity of First Nations and Métis to participate.
3. The Crown must recognize and support the unique capacity needs and realities of the Métis people and their elected governance structures at the local, regional and provincial levels and provide necessary funds.	3. The CPF acknowledges that consultation funding may be required to allow the affected community to participate in consultations and provides a website address for First Nations and Métis Consultation Participation Fund information.

4. Consultations must be with the Métis government structures that are elected and supported by the Métis people. Consultation with individual Métis, service delivery organizations, mayors and municipal councils and pan-Aboriginal structures cannot discharge the duty owed to the Métis, as a rights-bearing people.	4. For the purposes of the CPF, the Government recognizes the Presidents of Métis Locals or their authorized designates as the appropriate representatives of Métis communities. Regional or provincial Métis entities may be consulted only if the community leadership has delegated this authority through its constitutional decision-making process, and the consulting ministry has a written, signed copy of the authorization.
5. The Métis Nation has the responsibility to consult with its citizens and represent its citizens, not the Crown or industry.	5. The CPF outlines the roles and responsibilities of all parties. Aboriginal rights are collective rights held by a community of people. Consultations must therefore be targeted to the elected leaders or representatives of Métis communities. It is their responsibility to consult with their community members, not that of Government or industry.
6. Métis consultation processes must provide all Métis citizens the opportunity to participate and be heard.	6. This is a matter internal to the Métis community. As noted above, the CPF provides for consultations with the elected leadership or representatives of Métis communities. The policy does not require consultation with individual community members.
7. Ultimate decision-making with respect to consultation and accommodation must rest with the affected rights-bearing Métis community.	7. Under the CPF, the Government makes the decision with respect to whether consultations are required and the level of consultations required; in the case of Level 5 consultations, the community to be consulted will be provided with an opportunity to assist in developing a consultation plan. However, ultimate decision-making with respect to consultation, proposed decisions and actions is retained by Government. Métis communities do not have a veto over these decisions.
8. Consultation must be conducted in good faith.	8. See #1 in this section.
9. Consultation will occur before decisions are made. Rights-bearing Métis communities are not limited to individual villages, towns or cities. Consultation must occur with the potentially affected rights-bearing Métis community and its citizens.	9. The CPF provides that notification must be as early as possible and in advance of the decision to be made. In addition, proponents are encouraged to engage Métis communities early in the planning stages of projects in order to share information and to build relationships. The CPF does not purport to define Métis communities but it does indicate that the Presidents of Métis Locals or their authorized representatives are considered to be the proper representatives of the communities.

10. The MNS has a responsibility to the Métis people of Saskatchewan to protect and preserve their collective rights. Through the policy and principles set out in this document, the MNS does not waive the right to pursue legal avenues in order to protect or preserve the rights of the Métis people of Saskatchewan.	10. The CPF does not deny the right of communities to pursue legal challenges; however it is expected that the processes set out in the CPF will lead to serious discussions that will result in avoiding or mitigating adverse impacts on Aboriginal rights and traditional uses, with recourse to the courts being unnecessary.
11. For the purposes of this policy, it is asserted that the Crown has real knowledge of credible Métis rights claims throughout the entire province.	11. The Government will consult with Métis leadership in communities or regions where Métis Aboriginal rights have already been recognized, such as in Northern Saskatchewan. Where Métis Aboriginal rights have not yet been recognized, the decision to consult will be made on a case-by-case basis. Government will take into account the strength of the claims supporting the asserted rights and the extent of the potential impact on the exercise of the asserted rights.
12. The Crown must give notice that it is considering a development project, activity, legislative and regulatory changes, or other activities triggering a duty to consult. The notice, in writing, must go to the MNS governance entity.	12. Notification will be provided in writing to the Métis communities that may potentially be adversely affected by a Government decision or action. Notification will be as early as possible, and in advance of the decision to be made. Notice will be to the Métis Local or Locals potentially affected by the decision or to a regional or provincial body if duly delegated by the Local/s.
13. The Cr[illegible]ust fully inform the Métis about the proposed development. The Métis must fully inform the Crown about the land and resource use of the Métis people in the project area. Since Métis may not have necessary information in aggregate form or research and study is required, funding will be used to undertake necessary work.	13. The CPF provides that notification should provide clear, complete and understandable information in order to inform Métis communities about a proposed development, where it may impact Aboriginal rights or traditional uses. The Métis have a reciprocal obligation to respond to the Government's notification, making their concerns known about adverse impacts on Aboriginal rights and traditional uses. Where necessary, consultation participation funding may be made available.
14. Consultation should be conducted with the objective of avoiding infringement on Métis lifestyles and traditional land uses. Where avoidance is not possible, consultation will be conducted with the goal of mitigating such infringement – commonly referred to as the Crown's responsibility of accommodation.	14. One of the objectives of the CPF is to respect and protect Aboriginal rights and traditional uses by ensuring, through the consultation process and subsequent decisions, that negative impacts on these rights and uses are avoided, minimized or mitigated, and rights are accommodated as appropriate. Accommodation means that Government and the proponent would use their better understanding found through consultation with Métis to avoid, change, or amend the plan or action so as to minimize or avert negative impacts on any Aboriginal right and/or traditional use.